

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CARGILL, INCORPORATED	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42120
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

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APR 15 2011

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**CARGILL'S RESPONSE TO BNSF'S APRIL 11, 2011 REPLY**

**CARGILL, INCORPORATED**

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Dated: April 15, 2011

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On March 31, 2011, Cargill, Incorporated ("Cargill") filed a Motion to Compel Discovery ("Motion"). BNSF Railway Company ("BNSF") replied in opposition ("Reply") to Cargill's Motion on April 11, 2011. To assist the Board "in determining whether a discovery conference is needed," the Board issued an order on April 13 directing Cargill to respond to BNSF's Reply by April 15, 2011. *Id.* at 1

**PREFACE**

BNSF claims that it is not engaging in "hide the ball" discovery tactics because it "clearly set forth any limitations on the scope of what BNSF was agreeing to produce" in its discovery responses. Reply at 5. In fact, BNSF's responses to Cargill's requests for production ("RFP") were anything but "clear." BNSF lodged a large number of "General Objections" to Cargill's RFPs (29 in total), further injected a raft of additional opaque RFP-specific objections, and then stated in response to many requests: "*subject to . . . its specific and general objections . . . [it] will produce responsive, non-*

privileged materials, *if any*.” (Emphasis added). BNSF’s responses did not explain in any meaningful fashion to Cargill or the Board what documents BNSF is withholding based on one or more of the 29+ objections it tendered.

In its Motion, Cargill asked the Board to overrule some of BNSF’s most egregious general and specific objections. On Reply, BNSF withdraws some of these objections in whole or in part, but leaves others intact. Cargill responds to BNSF’s Reply in the manner requested by the Board.

### **ARGUMENT**

• **General Objection No. 6.** In its General Objection No. 6, BNSF objected to producing any data or information relating to, or derived from, its “internal management cost system.” In its Reply, BNSF now states that it will produce information from its management cost system that “relates to BNSF’s fuel costs and fuel consumption,” but it will not produce “margin, contribution or variable cost information.” *Id.* at 7. According to BNSF, this “approach to the production of sensitive internal management cost issue [sic] is reasonable, and it should not be disturbed.” *Id.*

As Cargill demonstrated in its Motion, fuel price and fuel consumption studies and data have never been deemed to fall within the rubric of “management costs.” *Id.* at 6. Moreover, the central issue in this case is whether BNSF is unlawfully using its fuel surcharges as a profit center. Complaint ¶ 7. BNSF denies this allegation (Answer ¶ 7), but BNSF lost its motion to dismiss it. *See Cargill, Inc. v. BNSF Ry.*, STB Docket No. 42120 (STB served Jan. 4, 2011) at 5 (“we . . . deny BNSF’s motion to dismiss Cargill’s Profit Center claim”).

Under BNSF's stated approach to management cost discovery, if BNSF's management prepared reports or analyses showing BNSF was using its fuel surcharges as profit centers, that information would not be made available to Cargill, or the Board. Thus, BNSF could deny using its fuel surcharges as profit centers in this case, even though its own internal "management cost" documents showed otherwise. While BNSF may prefer this result, it is certainly not one that the Board should endorse, nor one permitted under the Board's Rules of Practice, since such material is clearly "relevant to the subject matter involved in [this] proceeding." 49 C.F.R. § 1114.21(a).

BNSF cites cases holding that "[i]nternal costing models have not been shown to be relevant in rate cases." *Total Petrochemicals USA, Inc. v. CSX Transp. Inc. et al.*, STB Docket No. 42121 (STB served Dec. 23, 2010) at 3 ("*Total*"). Reply at 6. However, the instant case is not a rate case. The profit center management cost information Cargill has requested is clearly relevant in this unreasonable practice case, and BNSF's concerns about confidentiality are fully protected by the governing protective order.

BNSF also attempts to distinguish the decisions cited by Cargill where defendant railroads were ordered to produce internal management cost data. Motion at 6 n.1. BNSF contends these decisions are inapposite because they pre-date the ICC's adoption of URCS in 1989. *Id.* BNSF is correct that three of the cases Cargill cites were decided before the Commission formally adopted URCS in 1989, but this fact is not material.

In the cited cases, the ICC ordered the defendant carriers to produce internal management cost and profit data because the ICC found the requested data was relevant to issues raised in those cases. The cited ICC's rulings are also fully consistent with the STB's current case holdings: management cost data will be ordered produced if "shown to be relevant." *Total* at 3. Cargill has made the requisite relevancy showing in the instant case.

● **General Objection Nos. 1 and 10.** In its General Objection No. 1, BNSF objects to producing documents that contain commercially sensitive third-party information. In its General Objection No. 10, BNSF objects to producing documents relating to specific shippers or specific movements. In its Reply, BNSF at times characterizes these broad objections as a single objection to production of "shipper-specific" information, except for "Cargill information." Reply at 7. BNSF goes on to explain that in producing traffic data, BNSF has produced movement-specific data, "except for the shipper name." *Id.* If BNSF is willing to stipulate that it will apply the same standard in responding to all of Cargill's requests – *i.e.*, it will produce responsive movement-specific data, documents and information, but redact specific shipper's names (other than Cargill), that resolution is acceptable to Cargill, subject to a reservation of its right to seek specific shippers' names in the event that it becomes necessary in order for Cargill to effectively use the data in this proceeding.<sup>1</sup>

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<sup>1</sup> Cargill will follow up with BNSF to see if this stipulation is acceptable to BNSF.

BNSF argues that “shipper-specific” information is not “relevant” because Cargill must demonstrate that the assailed fuel surcharge is unlawful as applied to BNSF system traffic. Reply at 6-7. While the Board need not address this argument if BNSF accepts Cargill’s proposed stipulation, it is clearly incorrect. The whole is made up of its constituent parts. Information related to fuel consumption, and fuel surcharge profits, is relevant regardless of its level of aggregation – *i.e.*, at the movement level or at some aggregated level less than the full system level. For example, if BNSF relied on movement, lane, or commodity-specific fuel consumption studies in preparing or analyzing its fuel surcharge formulas, those studies are clearly relevant. As a second example, if BNSF has prepared movement, lane, or commodity-specific fuel surcharge profitability analyses, those analyses are also clearly relevant.

● **General Objection Nos. 13, 15, 22 and 23; Specific Objections to RFP Nos. 21 and 23.** In its General Objection Nos. 13, 15, 22 and 23, BNSF objected to producing any documents relating to its rebased mileage fuel surcharge (BNSF Rules Book 6100-A, tariff item 3376, section B) which went into effect on January 1, 2011. BNSF also objected to producing any documents responsive to Cargill’s RFP Nos. 21 and 23, each of which requested documents relating to BNSF’s rebased mileage fuel surcharge. In its Reply, BNSF asserts that Cargill’s requests that the Board overrule the referenced General Objections, and order BNSF to produce documents responsive to RFP Nos. 21 and 23, are “moot since BNSF plans to produce such documents.” Reply at 9. Cargill agrees, and withdraws its Motion as it applies to General Objection Nos. 13, 15,

22 and 23 and RFP Nos. 21 and 23, subject to Cargill's reservation of all of its rights to pursue these items after reviewing BNSF's production.<sup>2</sup>

- **General Objection No. 28** – In its General Objection No. 28, BNSF objected to producing responsive documents created before January 1, 2005 and after April 19, 2010. In its Reply, BNSF restyles its response as one where BNSF will conduct a search for responsive documents created between September 1, 2004 and December 31, 2010, subject to one exception: BNSF will search for documents created prior to September 1, 2004 relating to BNSF's use of the \$1.25 per gallon HDF strike price. Reply at 9-11. This new "search" time period is acceptable to Cargill and Cargill withdraws its request that the Board overrule BNSF's General Objection No. 28, subject to Cargill's reservation of all of its rights after reviewing BNSF's production.

- **Tariff Limitation Objection; RFP No. 9 and RFP No. 45** – BNSF objected to producing any documents not involving the "subject of this proceeding," which BNSF initially defined as the mileage based fuel surcharges in BNSF Rules Book 6100-A, tariff item 3375, section B, and, as discussed above, now BNSF has redefined to include BNSF's rebased mileage fuel surcharge set forth in BNSF Rules Book 6100-A, tariff item 3376, section B. However, BNSF objects to producing documents involving what it describes as "other fuel surcharge programs," which include its percent-of-price fuel surcharges on all traffic, and its mileage-based coal fuel surcharge on coal traffic.

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<sup>2</sup> BNSF states that it informed Cargill during the meet and confer process that it would withdraw the referenced General and Specific Objections, if Cargill supplemented its Complaint to include an express reference to the rebased mileage fuel surcharge tariff. Reply at 9. Cargill has no similar recollection of any such assertion by BNSF and did not learn that BNSF had withdrawn its objections until it read BNSF's Reply.

This includes BNSF objections producing documents in response to requests pertaining to, *inter alia*:

- how BNSF decided to group traffic for fuel surcharge purposes (RFP No. 3);
- how BNSF decided the relationship between changes in HDF prices and changes in its incremental fuel cost increases was linear (RFP No. 4);
- how BNSF developed its \$1.25 per gallon HDF strike price (RFP No. 5);
- analyses used to determine the BNSF step function contained in its fuel surcharge program applicable to coal unit trains (RFP No. 9);
- statements BNSF has publicly made in STB fuel surcharge proceedings (RFP Nos. 49, 51 and 53); and
- analyses that BNSF has prepared comparing its mileage-based fuel surcharges to those collected by other railroads (RFP No. 54).

BNSF argues that while information related to these “other programs” is “relevant,” production of this information should be denied because of the “burden that would be associated with collecting and reviewing the thousands of documents that relate solely to those other fuel surcharges.” Reply at 13.

Similarly, BNSF continues to object to producing any documents responsive to RFP No. 45. In that request, Cargill asked BNSF to produce a limited subset of documents that BNSF already produced in the *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, Misc. No. 07-489 (D.D.C.) (“*Antitrust Case*”). BNSF objects to this production on grounds that the *Antitrust Case* involves a



different fuel surcharge program, with the plaintiffs in the *Antitrust Case* alleging that BNSF unlawfully used its percent of price fuel surcharge collections as a profit center in violation of the antitrust laws. Reply at 13-14. BNSF also objects to responding to RFP No. 45 on grounds that BNSF did not break down its “850,000 page” production into defined subsets, and to require BNSF to respond to Cargill’s RFP No. 45 by breaking out a subset of the produced information would be “unduly burdensome.” Reply at 14.

Cargill proposes a simple compromise here – either one agreed to by BNSF<sup>3</sup> or ordered by the Board: BNSF will produce the documents it produced in the *Antitrust Case* in the same manner that Cargill understands they were produced in that *Case* – in an electronic, searchable data base. If BNSF does so, Cargill will withdraw its request that the Board overrule BNSF’s Tariff Limitation Objection and withdraw its motion to compel production in response to RFP Nos. 9 and 45. This result will place no burden whatsoever on BNSF other than copying existing electronic records, and will allow Cargill to perform its own search of these records for relevant information.

As Cargill emphasized in its Motion, the plaintiffs’ discovery in the *Antitrust Case* sought documents relating to all of BNSF’s fuel surcharge methods, not just BNSF’s percent of price approach (*id.* at 19), a fact BNSF does not dispute in its Reply. Moreover, BNSF’s “different program” objection is not material. If, as plaintiffs alleged in the antitrust case, BNSF was using its percent

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<sup>3</sup> Cargill will follow up with BNSF to see if this compromise is acceptable to BNSF.

of price fuel surcharges as a profit center, there is no reason to believe that BNSF would limit this management objective simply to one form of fuel surcharge methodology. Similarly, analyses relating to fuel consumption and fuel costs are not tied to the type of fuel surcharge applied.

- **RFP No. 46.** This request asks BNSF to produce deposition transcripts of BNSF deponents in the *Antitrust Case*. BNSF claims that it could run afoul of the protective order in that case if it produces confidential deposition exhibits that “were produced by other parties” or “the deposition testimony relating to” these exhibits. Reply at 15. To address BNSF’s objection, Cargill proposes that BNSF voluntarily produce, or the Board order BNSF to produce, redacted copies of deposition transcripts.<sup>4</sup>

BNSF also argues that the transcripts are not relevant because the *Antitrust Case* focuses on “different . . . issues” than the instant case. Reply at 15. It is true that the instant case is an STB unreasonable practice case, not an antitrust case, but both cases are predicated on the same underlying acts – unlawfully using fuel surcharges as profit centers. *Compare Antitrust Case*, Second Consolidated Amended Class Action Complaint at ¶ 99, MDL No. 1869, Misc. No. 07-489 (D.D.C. Feb. 3, 2010) (“Defendants realized billions of dollars in revenues during the Class Period in excess of their actual increase in fuel costs from the specific customers on whom they imposed the surcharge”) with Cargill’s Complaint ¶ 7 (“BNSF is using the Assailed Tariff Item to

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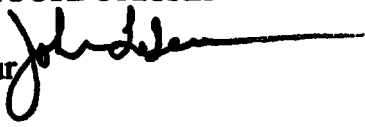
<sup>4</sup> Cargill will follow up with BNSF to see if this compromise is acceptable to BNSF.

extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied”).

● **RFP No. 47** – RFP No. 47 requests a subset of documents BNSF produced in the *Antitrust Case* and portions of BNSF deposition transcripts. These documents were cited by plaintiffs in the pending motion for class certification in the *Antitrust Case* to support, *inter alia*, plaintiffs’ claims that “while [BNSF and other carriers] repeatedly sought to assure their customers that the new Fuel Surcharges were intended only to recover incremental fuel costs . . . [BNSF and other carriers’] Fuel Surcharges . . . in fact resulted in significant over-recovery of fuel price increases.”<sup>5</sup> This request is mooted if BNSF voluntarily, or under Board order, produces the documents in the manner set forth above in response to RFP No. 45 and produces redacted deposition transcripts in the manner set forth above in response to RFP No. 46.

Respectfully submitted,

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Dated: April 15, 2011

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<sup>5</sup> See Plaintiffs’ Memorandum In Support of Motion For Class Certification at 40 *Antitrust Case*, MDL No. 1869, Misc. No. 07-489 (D.D.C. Mar. 18, 2010).

## **CERTIFICATE OF SERVICE**

Pursuant to 49 C.F.R. § 1111.3, I hereby certify that I have this 15<sup>th</sup> day of April, 2011 caused to be served copies of the foregoing Response on the following by hand delivery:

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